No. 78-458

In the Supreme Court of the United States

OCTOBER TERM, 1978

DE SOTO PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. This litigation began in January, 1967, when the United States filed suit seeking to desegregate the public schools in DeSoto Parish, Louisiana. In 1970, after protracted litigation, the district court approved a desegregation plan. In 1975, the United States filed a motion for further relief, alleging that the plan had failed to eliminate the dual school system and asking the district court to order and implement comprehensive modifications. Specifically, the United States claimed that under the 1970 plan the school board still maintained racially identifiable schools, failed to comply with the faculty assignment requirements established in *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1969), and continued to operate a segregated school bus system (Pet. App. 28, 33).

In ruling on the government's motion, the district court noted that five of the eleven schools now in operation in DeSoto Parish were originally constructed for blacks prior to the 1970 desegregation order. The court found that four of these five schools still had a student body which was 100 percent black, and that the fifth school's student body was 97 percent black. In the court's view, the school board's continued operation of a segregated student transportation system had been "the primary contributor to the one-race schools" (Pet. App. 18). While finding that the school board had not achieved the racial balance in faculty assignments required by *Singleton*, the court observed that gradual improvement had been made and expressed the hope that more rapid improvement would come in the future (Pet. App. 21-22). The court therefore granted the government's motion for supplemental relief only insofar as it sought dismantling of the dual transportation system and denied the motion in all other respects (Pet. App. 22).

The court of appeals affirmed as to the limited relief granted, reversed as to the denial of all other relief sought, and remanded the case to the district court with instructions to adopt and implement a comprehensive plan to eliminate the one-race schools and bring the system into a unitary status (Pet. App. 58).

Holding clearly erroneous the district court's finding that the racial composition of the schools was attributable "primarily" to the school board's retention of the dual transportation system (Pet. App. 42), the court of appeals found that the record was "replete with evidence" that other aspects of the 1970 plan, including the existing attendance zones and a "free choice" option, had also substantially contributed to the "continuing and extreme" racial imbalance in the schools (Pet. App. 42-47). The court noted that virtually no white students were zoned to

attend formerly black schools, a result achieved by "gerrymandering" around racially homogenous neighborhoods; and that the "free choice" option, by permitting almost all white students to attend the school of their choice, had resulted in only 13 white students attending formerly black schools from 1970-1976 (Pet. App. 45-57). The court therefore concluded that merely modifying the bus routes would not succeed in altering the racial composition of the schools (Pet. App. 43, 37).

Moreover, the court of appeals noted that, after five years of operation under a desegregation decree, the faculties of the traditionally black schools ranged from 59 percent to 79 percent black, while the faculties of the six traditionally white schools ranged from 71 percent to 81 percent white, although the systemwide ratio of black to white teachers was fifty-fifty (Pet. App. 32). The court emphasized that, contrary to the characterization of the district court, the reports submitted by the school board indicated no substantial improvement in faculty integration (Pet. App. 52).

Accordingly, the court of appeals required the district court to grant further relief, as requested by the United States (Pet. App. 53). Specifically, the court held that the existing attendance zones must be redesigned to achieve the "greatest possible degree of actual desegregation" (Pet. App. 54-55), and that the "free choice" option must be eliminated (Pet. App. 55). Further, the court of appeals instructed the district court to enforce *Singleton*, "in accordance with its terms, without further delay" (Pet. App. 58).

2. The decision of the court of appeals is correct. This Court held in *Swann* v. *Mecklenburg Board of Education*, 402 U.S. 1, 26 1971, that "in a system with a history of segregation the need for remedial criteria of sufficient

specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." The continued existence of all-black schools previously so designated under a dual system requires close judicial scrutiny and places the burden on school board officials to establish that the racial composition of these schools is not a product of past or present discrimination by school authorities (*ibid.*).

In this case, all five of the existing schools which were racially identifiable prior to the 1970 desegregation decree remain so today. The evidence fully supported the court of appeals' conclusion (Pet. App. 42) that the existing attendance zones and the "free choice" option, as well as the segregated transportation system, had substantially contributed to the "extreme" racial imbalance in the schools. Moreover, even the district court recognized (Pet. App. 21-22) that the school board had not achieved the *Singleton* requirement that the faculty of each school reflect the systemwide racial ratio for faculty members; as the court of appeals emphasized, the *Singleton* rule is a command based on the Constitution, not an optional set of guidelines (Pet. App. 51). In this context, the court of appeals properly required the district court to order comprehensive relief designed to eliminate "all vestiges of state-imposed segregation." *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1970), quoting *Swann, supra*, 402 U.S. at 15.[1]

[1]Here, therefore, as in *Lee* v. *Demopolis City School Board*, 557 F. 2d 1053 (5th Cir. 1977), certiorari denied, 434 U.S. 1014 (1978), the court of appeals' order is not inconsistent with the procedures set forth in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977). See Pet. App. 43, n. 20. The court of appeals exactingly tailored "the scope of the remedy" to fit "the nature and extent of the constitutional violation," *Brinkman, supra*, 433 U.S. at 420, quoting *Milliken* v. *Bradley* 418 U.S. 717, 738 (1974).

The court of appeals' ruling is consistent with other post-*Swann* decisions in similar cases; this Court has repeatedly declined further review in these cases. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F. 2d 878 (5th Cir. 1972), certiorari denied, 410 U.S. 966 (1973); *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857 (5th Cir. 1974), certiorari denied, 421 U.S. 913 (1975); *United States* v. *Texas Education Agency*, 512 F. 2d 896 (5th Cir. 1975), certiorari denied, 423 U.S. 837 (1975); *United States* v. *Columbus Municipal Separate School District*, 558 F. 2d 228 (5th Cir. 1977), certiorari denied, 434 U.S. 1013 (1978); *Lee* v. *Demopolis City School System*, 557 F. 2d 1053 (5th Cir. 1977), certiorari denied, 434 U.S. 1014 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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